In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1417

CHARLES FRANCIS DENARVAEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 407 F.2d 185.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1969. A petition for rehearing was denied on April 23, 1969. The petition for a writ of certiorari was filed on May 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for knowingly failing to report for a physical examination and induction into the Armed Forces.

2. Whether the orders to report were void because notices of the orders were sent to petitioner by the draft board clerk without specific directions from the board members.

STATEMENT

A three-count indictment filed in the United States District Court for the Southern District of New York charged petitioner with failing to report for an Armed Forces physical examination on March 6 and April 3, 1962 (counts 1 and 2), and failing to report for induction on February 13, 1963 (count 3), in violation of 50 U.S.C. App. 462(a). After a jury-waived trial, petitioner was acquitted of count 1 and convicted of counts 2 and 3. On May 16, 1968, he was sentenced to imprisonment for six months on count 2 and unsupervised probation for eighteen months on count 3, the sentences to run consecutively. The court of appeals affirmed.

The evidence showed that petitioner was born in Bethlehem, Pennsylvania, on October 5, 1937. His mother was an American citizen and his father a citizen of Colombia (Tr. 45). Shortly after his birth, petitioner was taken by his parents to Bogota, Colombia. He remained there continuously until 1955, when he entered a military preparatory school in Staunton,

Virginia (Tr. 46). In 1956, petitioner's parents moved to Pelham, New York, and petitioner transferred to a high school in Pelham. He registered with Local Board No. 10 in Pelham prior to his graduation from high school in 1957 (Tr. 67).

After graduation, petitioner enrolled at and attended the University of Miami, in Coral Gables, Florida, and advised his local board accordingly. He received a student deferment until his graduation in January 1962 (Tr. 15-17). On February 7, 1962, petitioner was reclassified I-A. On February 23, a notice to report on March 6 for a physical examiation was sent to his home of record in Pelham (Tr. 23). Petitioner failed to report because he had left the country on February 12 for a trip to Bogota. Upon learning of the board's notice, petitioner, on March 3, 1962, replied to the board by letter from Bogota. He indicated that he had left the United States on a tourist visa to visit relatives; that he planned to remain out of the country for another two weeks; that when he returned he would be residing at 260 Navarre Avenue, Coral Gables, Florida; and that he desired an extension of the date for undergoing the physical examination (Tr. 25-26). The board immediately sent a letter to petitioner's Bogota address, informing him that he would be rescheduled for a physical examination in April (Tr. 26). The letter of March 3, 1962, was the last communication received from petitioner until his arrest four years later.

On March 22, 1962, the local board mailed petitioner a notice to report for a physical examination

on April 3. The letter was sent to the Navarre Avenue address in Coral Gables. Petitioner failed to report or respond. According to his uncontradicted testimony, he returned to the United States on April 14, and then left for Bogota again nine days later, without contacting the board (Tr. 71). He remained in Bogota until January 1966. In the meantime, the board, unaware of petitioner's location, sent a letter to the Navarre Avenue address, dated April 9, 1962, asking why he did not report. The letter was not returned. On August 22, 1962, the board again sent a notice to report for a physical examination to petitioner at the Navarre Avenue address. This letter was returned to the board with the notation that petitioner had moved and had not left a forwarding address (Tr. 27, 34). The board then remailed the notice to his family's address in Pelham, but it was again returned. Information was obtained from an individual residing at the Pelham address that petitioner's family had moved to 1228 Sevilla Avenue, Coral Gables, Florida. On September 18, 1962, the board mailed an order to report for induction on October 9, 1962, to the Sevilla Avenue address. Neither this letter nor a follow-up letter mailed on October 16 was returned, but petitioner failed to report as directed (Tr. 29-32).

On January 2, 1963, the board declared petitioner a delinquent, and sent a letter dated January 8 to the Sevilla Avenue address informing him of that action. The letter was not returned. Since all of the letters to Goral Gables had proved unproductive, the board, on January 18, 1963, mailed to the Pelham,

New York, address a notice to report for induction on February 13. This letter was never returned, but petitioner failed to report (Tr. 38-39). The next attempt to order petitioner to report for induction came in May 1963. This letter was mailed to Bogota. Petitioner failed to respond or report as ordered.

Petitioner, testifying at trial, denied receiving any of the local board's notices after March 1962 (Tr. 55-57). He stated that his parents lived in Pelham until 1961 or 1962, but then leased their house and moved to Coral Gables and thereafter to Bogota (Tr. 71-73). He admitted that his parents owned a home at 1228 Sevilla Avenue in Coral Gables, had been living there off and on for a number of years, and were residing there at the time of trial. Petitioner insisted, however, that this was only a temporary residence (Tr. 71, 76-77). He denied any intent to avoid submission to the directives of the Selective Service System (Tr. 78).

ARGUMENT

1. The primary basis of petitioner's contention that the evidence was insufficient to support his conviction is that there was no showing that he actually received the orders to report for a physical examination and induction after March 3, 1962. Whether or not the notices were sent, petitioner urges, his unrefuted testimony that he did not receive them requires reversal of his convictions for a knowing failure or neglect to perform duties prescribed by the Selective Service Act.

Although the government could not show receipt of the notices by direct evidence, the facts and circum-

stances adduced furnished adequate ground for belief beyond a reasonable doubt that petitioner knew he was required to notify the local board of his changes of address but did not, that he knew the board desired him to undergo a physical examination, and that he realized that the logical result of his inaction after a period of months was induction as a delinquent. The evidence of the numerous unreturned letters and petitioner's conduct throughout the entire period amply supports the element of scienter. Proof of actual receipt of an order is not essential to a finding that petitioner "knowingly" failed to comply with the duty which it prescribed. *Stiles* v. *United States*, No. 74, 1968 Term, certiorari dismissed as improvidently granted, 393 U.S. 219. Congress plainly did not contemplate that an individual could escape prosecution by placing himself beyond the reach of the process by which the board ordinarily communicates its notices and orders and then claiming that he did not receive them. See *Moorman* v. *United States*, 389 F.2d 27 (C.A. 5); 32 C.F.R. 1641.3.

Petitioner attacks the lower courts' partial reliance upon the long-standing presumption that an unreturned letter has reached its destination and has been received by the addressee. See *Hagner* v. *United States*, 285 U.S. 427, 430. He suggests that nowadays many letters are misdelivered or nondelivered. The volume of letters reaching their addressees, however, is still undoubtedly an overwhelming proportion of the vast amount of mail moving through the United States postal system. The presumption of delivery remains sound and rational, even though an occasional

letter might go astray. In petitioner's case particularly, the suggestion that not one of the unreturned letters sent by the board reached petitioner taxes credulity. The trial judge, as fact finder, had strong reason to reject petitioner's testimony to that effect.[1]

2. Petitioner challenges the validity of the orders to report on the ground that they were issued by the clerk rather than by the members of the draft board. This argument overlooks the distinction between the order itself and the form in which it is communicated to the registrant. The evidence at trial showed that the members of the local board had voted on the reclassification of petitioner to I-A following his graduation from college and on its subsequent determination that he was delinquent. In addition, the coordinator of the local board testified that petitioner was notified to report in the regular order of call. The steps between reclassifying and determining that petioner was a delinquent were largely ministerial. Selective Service regulations specify in precise detail the order in which the local board must call up men to fill its quota. 32 C.F.R. 1631.7(a). Once petitioner was declared a delinquent by the board, his inclusion in the call was mandatory. The fact that the acts of communicating the orders to petftioner were per-

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[1] *Venus* v. *United States*, 368 U.S. 345, reversing 287 F.2d 304 (C.A. 9), and *Ward* v. *United States*, 344 U.S. 924, reversing 195 F.2d 441 (C.A. 5), the cases relied upon by petitioner (Pet. 7), are distinguishable on their facts. In *Ward* this Court found "[t]he record does not support the charge that, during this period, there was deliberate purpose on the part of petitioner not to comply with the Selective Service Act or the regulation issued thereunder."

formed by the clerk of the board hardly qualifies as a defense to prosecution for failing to report, especially where, as here, no prejudice has been shown. See Brief for the United States in *Stiles* v. *United States*, No. 74, 1968 Term, certiorari dismissed as improvidently granted, 393 U.S. 219, pp. 29-32; *United States* v. *Crowley*, 405 F.2d 400 (C.A. 4), certiorari denied, 394 U.S. 904; *Mason* v. *United States*, 218 F.2d 375, 377 (C.A. 9); *Kalpakoff* v. *United States*, 217 F.2d 748, 749-750 (C.A. 9), certiorari denied, 348 U.S. 982; *Kent* v. *United States*, 207 F.2d 234 (C.A. 9); *Smith* v. *United States*, 157 F.2d 176, 181-182 (C.A. 4), certiorari denied, 329 U.S. 776; *United States* v. *Fratrick*, 140 F.2d 5, 6-7 (C.A. 7); and the cases cited by petitioner (Pet. 9).[2]

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[2] As noted previously (*supra*, p. 4), petitioner was declared a delinquent by his local board in 1963. He makes no challenge to the validity of the delinquency regulations, however. Such an attack is involved in *Gutknecht* v. *United States*, No. 1176, 1968 Term, in which certiorari was granted on April 28, 1969, but in a rather different context. Moreover, the validity of the delinquency regulations is at issue in a direct appeal taken by the government from the granting of a motion in arrest of judgment in *Eisdorfer* v. *United States*, No. 67 CR 302, E.D. N.Y. (decided April 18, 1969). But since petitioner makes no claim in this regard, and since the delinquency procedure played a wholly insignificant part in the instant case, we perceive no sound reason for awaiting the outcome of *Gutknecht* and *Eisdorfer* before acting on this petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1969.

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